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No. 87-1295

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether reasonable suspicion that a person is engaged in narcotics trafficking can be based on a commonsense analysis of all the information in an officer's possession, or whether it must be based on at least one factor that constitutes direct evidence of an ongoing crime, plus circumstantial evidence that can be considered only if its significance is verified by empirical or statistical evidence.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-33a) is reported at 831 F.2d 1413. The initial opinion of the court of appeals, as amended (Pet. App. 34a-46a), is reported at 808 F.2d 1366. The other orders and opinions in this case, including the order of the court of appeals remanding the case for additional factual findings (Pet. App. 50a-51a); the opinion of the district court on remand from the court of appeals (Pet. App. 47a-

49a); the order and opinion of the district court denying respondent's motion to suppress (Pet. App. 52a-55a); and the magistrate's report and recommendation (Pet. App. 56a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. A petition for rehearing was denied on November 4, 1987 (Pet. App. 1a-2a), and a supplemental petition for rehearing was denied on May 11, 1988 (J.A. 67).¹ On December 30, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1988. The petition was filed on that date and was granted on June 6, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following the denial of a motion to suppress evidence in the United States District Court for the District of Hawaii, respondent entered a conditional plea

¹ The unusual proceedings that the court of appeals followed in taking final action on our supplemental petition for rehearing and our suggestion for rehearing en banc are described in our supplemental and reply memorandum at the petition stage (at 1-3), and in our May 16, 1988, letter to the Clerk of this Court.

of guilty to the charge of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a special parole term of three years. The court of appeals reversed by a divided vote.

1. On July 22, 1984, respondent Andrew Sokolow approached the United Airlines ticket counter at the Honolulu airport.² He appeared to be roughly 25 years old; he was dressed in a black jumpsuit and a good deal of gold jewelry; and he was accompanied by a woman. He purchased two round-trip tickets to Miami for \$2100 in the names of Andrew Kray and Janet Norian. Respondent paid for the tickets with cash from a large roll of \$20 bills that he handed to the ticket agent. The agent counted out \$2100, which depleted the roll by about half, and he returned the rest of the roll to respondent. Neither respondent nor his companion checked any luggage, although they had four bags with them. Upon request, respondent gave the ticket agent a telephone number. The ticket agent noticed that respondent seemed nervous while he was buying the tickets. Pet. App. 2a, 56a; J.A. 15, 18, 41-42, 51.

After respondent left for his flight, the ticket agent told Officer John McCarthy of the Honolulu Police Department about respondent's cash purchase of the tickets. Officer McCarthy, who was a member of the Department's Airport Task Force, checked the tele-

² The facts were developed at suppression hearings conducted by the magistrate and the district court on three separate days. In addition, the parties stipulated to facts contained in the affidavits of Honolulu Police Officer John McCarthy that were filed in support of search warrant applications in this case. J.A. 18-21.

phone number that respondent had left with the ticket agent and learned that it was listed to a "Karl Herman." Officer McCarthy was unable to find any Hawaii listing under the name "Andrew Kray."³ The ticket agent later identified respondent's voice on a recorded message at the telephone number respondent had left. Pet. App. 2a-3a, 56a-57a; J.A. 15-16, 42-43, 45-46.

Officer McCarthy subsequently learned that respondent and Norian were scheduled to return to Honolulu on July 25, three days after they had left. He also learned that on the way back from Miami they were scheduled to make stopovers in Denver and Los Angeles. Narcotics agents subsequently spotted respondent, during his return trip from Miami, in a waiting area at the Los Angeles airport. The agents noticed that respondent "appeared to be very nervous and was looking all around the waiting area." J.A. 43-44; see *id.* at 16, 19.

Respondent and Norian arrived in Honolulu at about 6:30 p.m. on July 25. Respondent was wearing the same black jumpsuit and gold jewelry. Once again, he and Norian had checked no luggage but were carrying four bags. Upon deplaning in Honolulu, they walked directly to a street level taxi stand. The narcotics agents who had been watching respondent decided to approach him to examine his identification and airline tickets. Pet. App. 3a, 57a; J.A. 16, 29, 31, 43, 57.

At 6:41 p.m., while respondent was waiting for a cab, Drug Enforcement Administration (DEA)

³ After respondent's arrest, the agents learned that "Karl Herman" was respondent's roommate. Pet. App. 2a-3a; J.A. 23-24, 47.

Agent Kempshall displayed his credentials, took respondent by the arm, and guided him back onto the sidewalk. Pet. App. 47a, 57a; see J.A. 31-32.⁴ Agent Kempshall asked respondent for his ticket and identification; respondent replied that he had neither. Respondent told the agents that his name was "Sokolow" but that he was traveling under his mother's maiden name, "Kray." He also claimed that a man named "Marty," whom he had met on the beach, had purchased the tickets for him. Pet. App. 3a, 57a; J.A. 16, 19, 31-32, 53-55, 57-58.

Agent Kempshall then told respondent that his luggage would be examined by a narcotics detection dog, and respondent carried his bags to the airport customs area. At 6:54—less than 15 minutes after the agents had approached respondent—the dog alerted to respondent's brown shoulder bag.⁵ The agents arrested respondent, took him to the Customs Service airport area, and sought a warrant authorizing a search of the shoulder bag. In the meantime, a woman with an extensive record of narcotics and prostitution arrests was brought into the DEA office on an unrelated matter. She identified respondent as a person she knew as "Andrew" who had purchased two or three "papers" of heroin a day over the past two years from her supplier. Pet. App. 4a, 57a-58a; J.A. 16-17; 10/29/84 Tr. 16-21; 9/22/86 Tr. 49-59, 76.

⁴ Agent Kempshall denied that he had any physical contact with respondent at that time. J.A. 55-56. Nonetheless, the district court found respondent's account of the event, in which he claimed that one of the agents grabbed his arm and guided him back to the sidewalk, "reasonably believable." Pet. App. 47a; see J.A. 31-32.

⁵ The dog had correctly identified the presence of controlled substances on hundreds of prior occasions. J.A. 17.

After the warrant issued, the agents searched the brown shoulder bag. They found no narcotics, although cocaine residue was later found in that bag. 9/22/86 Tr. 62, 64. The agents did uncover some suspicious documents,⁶ and they had the narcotics detection dog re-examine the remaining three bags. That time, the dog alerted to a medium-sized carry-on bag. Because it was then 9:30 p.m., the agents told respondent that they could not obtain a search warrant for the bag until the following morning. They permitted respondent to leave but kept his luggage. At 7:45 a.m. the next day, a second narcotics detection dog examined the carry-on bag, and that dog also detected narcotics. The agents obtained a search warrant and found 1000 grams of cocaine inside the bag. Pet. App. 4a, 58a-59a; J.A. 20; 9/22/86 Tr. 62-64, 88-89.

2. Respondent moved to suppress the cocaine. Following an evidentiary hearing, a magistrate recommended that the motion be denied. The magistrate found that the agents had reasonable grounds to suspect that respondent was involved in drug trafficking when they approached him at the curb outside the airport. Pet. App. 56a-62a. The magistrate also found that, once the narcotics detection dog alerted to narcotics in respondent's luggage, the arrest of respondent and the ensuing seizure and searches of

⁶ The agents found airline tickets in the names of Andrew Kray and James Wodehouse for two round trips from Honolulu to Miami, as well as Miami hotel receipts for those trips. The agents also found handwritten notes that appeared to be records of drug transactions. In respondent's personal address book, the agents found the names and addresses of persons suspected of drug trafficking. Finally, the agents found keys to four safety deposit boxes. J.A. 20; C.A. Excerpts of Record (E.R.) 60; McCarthy Affs. 2, 3.

his luggage were supported by probable cause. *Id.* at 60a-61a. The district court agreed with the magistrate and denied respondent's suppression motion. *Id.* at 52a-55a.

3. The court of appeals reversed by a divided vote. Pet. App. 34a-46a.⁷ The court held that respondent was seized at the curb outside the airport and that the seizure was not supported by reasonable suspicion. *Id.* at 39a-44a. In concluding that the seizure was unlawful, the court separately examined each of the facts known to the agents and concluded that none of them amounted to reasonable suspicion that respondent was involved in narcotics trafficking. *Id.* at 40a-43a. The court found that only one fact gave any support to the agents' suspicion: respondent's purchase of the tickets with a large wad of cash. The court acknowledged that that fact by itself was "close" to "particularized evidence of suspicious activity." *Id.* at 42a. Nonetheless, the court concluded that respondent's \$2100 cash purchase of airline tickets was not sufficient, standing alone, to justify stopping him, because it did not indicate that he was engaged in criminal activity at that moment. *Id.* at 43a.

Judge Wiggins dissented. Pet. App. 44a-46a. He found that respondent's \$2100 cash purchase of airline tickets "is sufficiently suspicious that the addi-

⁷ Before issuing its decision, the court of appeals remanded the case to the district court and directed the court to make supplemental findings on several issues. Pet. App. 50a-51a. Following a further evidentiary hearing on remand, the district court reaffirmed the denial of respondent's suppression motion. *Id.* at 47a-49a. The district court found that respondent had been detained at the curb (*id.* at 47a), but that the detention was supported by reasonable suspicion that respondent possessed narcotics. *Id.* at 47a-48a.

tion of [a] few other relatively anomalous characteristics could support a founded suspicion of illegal activity." *Id.* at 45a. He disagreed with the majority's contention that the cash payment was not evidence of "'ongoing' criminal activity," since large amounts of cash are often used "to conceal illicit travel patterns, or to buy drugs." *Ibid.* When respondent's cash purchase was added to the brevity of the trip, Miami's reputation as a known source city for drugs, and the lack of checked luggage, Judge Wiggins concluded that the agents had reasonable suspicion. *Id.* at 45a-46a. Judge Wiggins criticized the majority for looking at "each evidentiary factor discretely." As he put it, the majority should have viewed "the whole mosaic rather than each tile." *Id.* at 46a.

4. On rehearing the government argued that the court had erred by examining each fact known to the agents in isolation rather than by examining "the totality of the circumstances—the whole picture." *United States v. Cortez*, 449 U.S. 411, 417 (1981). In response, the court filed a new opinion taking a different approach. The court, however, adhered to its conclusion that respondent's conviction should be set aside on the ground that the stop was not supported by reasonable suspicion. Pet. App. 1a-21a. In the new opinion, the court stated that in its view the facts known to the agents described "not ongoing criminal activity but a class of people that is predominantly criminal." *Id.* at 10a. It concluded that the government had "unwittingly equate[d] evidence of behavior that a criminal may engage in with behavior indicating an ongoing crime." *Id.* at 8a (emphasis in original).

The court of appeals segregated the facts that bear on the reasonable suspicion inquiry into two cate-

gories: facts describing ongoing criminal activity, and facts describing personal characteristics shared by drug couriers. In the first category the court placed factors such as a person's use of an alias or evasive movement through an airport; at least one such factor, the court held, must be present to justify a finding of reasonable suspicion. Pet. App. 11a-12a. In the second category the court placed factors such as cash payment for tickets, a quick trip to and from a major source city, nervousness, manner of attire, and the absence of checked luggage. Those factors, the court held, are merely characteristics shared by drug couriers in general and are not evidence of ongoing criminal conduct. *Id.* at 12a. Those factors are relevant, the court held, only if at least one factor from the first category is also present. *Id.* at 14a, 19a. Even then, the court further held, agents may rely on factors in the second category only if they can demonstrate with "[e]mpirical documentation" (*id.* at 13a) or "statistical evidence" (*id.* at 14a) that the factor in question does not describe the behavior of "significant numbers of innocent persons." *Id.* at 13a; see also *id.* at 12a.

The court then applied its two-part test to the facts in this case. Pet. App. 18a-20a. It found no evidence that respondent had used an alias, despite the discrepancy between the name he gave the airline ticket agent when purchasing the tickets and the name under which his telephone number was listed. The court noted that "it is not unusual for persons with different last names to share a common residence and telephone." *Id.* at 18a. The court also discounted respondent's nervousness while awaiting a connecting flight at the Los Angeles airport, because "[t]here is no evidence on the record to indicate that

[respondent's] nervousness was indicative of an attempt to evade detection." *Id.* at 19a-20a. In the court's view, "[n]ervousness would appear to be a normal human reaction to air travel today, with a seemingly growing risk of mid-air collision and the near certainty of delays that may interrupt the plans of travelers." *Id.* at 20a. Having discounted the evidence that respondent was traveling under an alias and that he seemed to be nervous, the court rejected as "[un]substantiat[ed]" the government's contention that the combination of all the facts in this case "will rarely, if ever, describe an innocent traveler." *Ibid.*

Judge Wiggins again dissented. Pet. App. 21a-33a. He noted that respondent's detention "was brief, served the important law enforcement purpose of detecting drug couriers, and lasted no more than necessary to effectuate this purpose." *Id.* at 22a. He stated that in his view the majority's approach was "overly mechanistic" and "contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts." *Id.* at 25a (emphasis in original). In Judge Wiggins' view, the facts in this case established reasonable suspicion. *Id.* at 28a-29a. He placed particular emphasis on respondent's \$2100 cash purchase of airline tickets, because "[i]nnocent persons do not characteristically carry thousands of dollars in twenty dollar bills on their persons." *Id.* at 28a. Such a large cash payment is also inconsistent with a legitimate business trip, he concluded, since it does not provide documentation of expenses that can be used for reimbursement or tax purposes. *Ibid.* Judge Wiggins also noted that the brevity of the trip and the lack of checked luggage were inconsistent with a pleasure trip (*id.* at 28a-

29a) and that respondent's nervous and watchful behavior during the stopover on his return trip was "hardly a sign of an innocent traveler." *Id.* at 29a. The majority's approach, Judge Wiggins warned, "effectively throttles the efforts of drug enforcement agents to combat escalating narcotics trafficking" (*id.* at 33a) and would render invalid "many, and perhaps all, *Terry* stops that rely upon drug courier profile characteristics." *Id.* at 21a.

SUMMARY OF ARGUMENT

A. The facts known by the narcotics agents when they stopped respondent supported a reasonable belief that respondent was engaged in criminal activity. First, respondent's large cash purchase of airline tickets was unusual and made it appear unlikely that he was on a legitimate business or personal trip; instead, the use of such a large amount of cash suggested that the trip might have an illicit purpose, because the use of cash could help respondent to conceal his identity. Second, the discrepancy between the name that respondent gave the airline ticket agent and the name under which his telephone was listed suggested that respondent might be using an alias, which is a common practice for drug smugglers. Third, his destination, Miami, is a major source of narcotics. Fourth, respondent's long trip to Miami for only a very brief stay indicated that he was not on a vacation. Fifth, respondent's nervousness, in light of the other evidence, suggested that he was engaged in an illicit venture. Sixth, the other facts, such as respondent's exclusive use of carry-on baggage, were also consistent with drug trafficking, since the use of carry-on bags allows for a quick departure from an airport and lessens the risk that the bags in

which the narcotics are secreted will be lost or accidentally opened.

B. The court of appeals devised a new two-part test to govern the reasonable suspicion determination in the airport context. That test is overly mechanical and impedes rather than assists analysis of the strength of the evidence adduced in support of a narcotics officer's judgment.

The court of appeals' test is based on a misinterpretation of this Court's decision in *Reid v. Georgia*, 448 U.S. 438 (1980). *Reid* did not adopt a new reasonable suspicion test that requires the police to discount any fact that may have an innocent explanation. In fact, *Reid* and the Court's other decisions on reasonable suspicion make clear that the police can consider all the circumstances, including entirely lawful conduct, in determining whether they have sufficient justification to detain a suspect briefly for investigative purposes. The court of appeals' test also disregards the Fourth Amendment principles that the Court has articulated to guide the reasonable suspicion determination. Requiring empirical proof that particular characteristics are not shared by large numbers of innocent travelers ignores the principle that reasonable suspicion does not require the same level of confidence required for proof at trial or for probable cause. It also ignores the principle that the facts must be considered as a whole, and the principle that the evidence must be viewed in light of the inferences that can be drawn by trained law enforcement officers. Finally, the court of appeals' test would prove unworkable in the field, and would prevent agents from briefly detaining suspected drug smugglers absent the direct observation of criminal conduct and a high degree of certainty about the

sufficiency of circumstantial evidence. As a result, the court of appeals' test would seriously interfere with the efforts of federal and local police to halt narcotics trafficking through the nation's airports.

ARGUMENT

THE BRIEF INVESTIGATIVE DETENTION OF RESPONDENT DID NOT VIOLATE THE FOURTH AMENDMENT

A. The Facts Known By The Agents Justified Their Belief That Respondent Was In Possession Of Narcotics

Since *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has consistently held that a police officer may stop and briefly detain a person for investigative purposes if the officer observes suspicious conduct that leads him reasonably to conclude in light of his experience that criminal activity may be afoot, even if the officer lacks probable cause to believe that the suspect has committed or is about to commit a crime. *Terry* phrased the inquiry as whether "specific and articulable facts, taken together with rational inferences from those facts," suggest that a crime "may be afoot." 392 U.S. at 21, 30. See also *United States v. Cortez*, 449 U.S. 411, 417 (1981) (stating the inquiry as whether the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity"). The answer to that inquiry will turn on the facts of each case, but the Court's decisions have established three important principles to guide the application of that test to the facts.

First, a law enforcement officer is not required to exclude all innocent explanations for the suspect's conduct, or even to conclude that the suspect's actions

are more likely to be culpable than innocent. Rather, an officer may act when he observes suspicious conduct that leads him reasonably to conclude in light of his experience that criminal activity "may be afoot." *Terry v. Ohio*, 392 U.S. at 30. Put another way, although the officer cannot rely on his "inchoate and unparticularized suspicion or 'hunch'" (*id.* at 27), the reasonable suspicion standard demands only "some minimum level of objective justification to validate the detention or seizure." *INS v. Delgado*, 466 U.S. 210, 217 (1984).⁸ *Second*, in determining whether a set of factors gives rise to reasonable suspicion, it is wrong to consider each factor in isolation and to determine whether it standing alone supplies reasonable suspicion. On the contrary, "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account" when determining if there is reasonable suspicion that a person may be connected with criminal activity. *United States v. Cortez*, 449 U.S. at 417.⁹ *Third*, the evidence known to an officer must

⁸ See also *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985); *Michigan v. Summers*, 452 U.S. 692, 699 (1981); *Adams v. Williams*, 407 U.S. 143, 145-146 (1972); cf. *United States v. Ramsey*, 431 U.S. 606, 612-613 (1977) (explaining that the "reasonable cause" standard of 19 U.S.C. 482 authorizing customs officers to search imported merchandise is lower than the probable cause standard); see generally 3 W. LaFave, *Search and Seizure* § 9.3(b), at 431 (2d ed. 1987) ("it would seem clear that the more-probable-than-not standard is never applicable to a brief stopping for investigation"); *id.* at 432 & n.58 (collecting cases in which courts "quite properly" upheld a *Terry* stop even though the actions observed were consistent with innocent activity).

⁹ See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 n.10 (1975) ("Each case must turn on the totality of the

be viewed, "fact on fact and clue on clue," in light of the inferences and deductions that a trained and experienced officer would reach, "inferences and deductions that might well elude an untrained person." *Id.* at 418, 419.¹⁰

In this case, the narcotics agents who stopped respondent outside the Honolulu airport had a particularized and objective basis for suspecting him of possessing narcotics. The facts on which the agents relied are ones that repeatedly have been endorsed by this Court and the courts of appeals in upholding reasonable suspicion stops. See 3 W. LaFave, *Search and Seizure* § 9.3(c), at 446-447 (2d ed. 1987). Those facts were as follows:

1. *Respondent paid \$2100 in cash for his airline tickets from a roll of \$20 bills that appeared to contain about \$4000*

Paying \$2100 in cash for airline tickets is unusual. To pay that sum of money from a roll containing about twice that amount in \$20 bills is even more exceptional. Most business travelers purchase

particular circumstances."); *Terry v. Ohio*, 392 U.S. at 22 ("a series of acts, each of them perhaps innocent in itself * * * taken together [may] warrant[] further investigation").

¹⁰ See also *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 563-564 (1980) (opinion of Powell, J.); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (a trained, experienced officer can "perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"); *United States v. Brignoni-Ponce*, 422 U.S. at 885 ("In all situations the officer is entitled to assess the facts in light of his experience."); *Terry v. Ohio*, 392 U.S. at 27 ("due weight must be given * * * to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience").

airline tickets with a credit card or a check in order to have a receipt for reimbursement or tax purposes. In addition, few persons on a vacation or a pleasure trip carry thousands of dollars in cash in small denominations. The use of cash is, however, commonplace among persons engaged in criminal activity. The cash purchase of airline tickets avoids the need to supply the airline with identification and thereby enables a traveler to use an alias. The use of cash also makes it more difficult for law enforcement authorities to reconstruct a suspect's activities after the fact. Thus, respondent's large cash purchase of airline tickets suggested that he wanted to avoid leaving a trail of receipts behind him, which in turn indicated that he was not traveling for a legitimate business or personal reason. Narcotics traffickers, moreover, commonly have large amounts of cash available to them, both because of the large profits made in that trade and the frequency with which narcotics transactions are conducted in cash. Accordingly, respondent's large cash purchase of airline tickets is a fact suggesting that he may have been involved in illicit activities, and possibly narcotics trafficking.¹¹

¹¹ The cash purchase of airline tickets is a factor that is frequently cited to support a finding of reasonable suspicion. See, e.g., *United States v. Whitehead*, No. 87-5093 (4th Cir. May 24, 1988) slip op. 20 ("Whitehead paid for his \$403 ticket in cash, thus avoiding the need to present identification"); *United States v. Knox*, 839 F.2d 285, 290 (6th Cir. 1988), petition for cert. pending, No. 87-1927; *United States v. Espinosa-Guerra*, 805 F.2d 1502, 1508 (11th Cir. 1986); *United States v. Hanson*, 801 F.2d 757, 761-763 (5th Cir. 1986); *United States v. Williams*, 726 F.2d 661, 663 (10th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States v. Jodoin*, 672 F.2d 232, 234 (1st Cir. 1982).

The court of appeals rejected that inference because it believed that the cash purchase of airline tickets did not demonstrate that criminal activity was afoot "at that time." Pet. App. 43a (emphasis in original). That reasoning is flawed. Although some people may purchase airline tickets with cash (e.g., when taking a short shuttle flight), few innocent air travelers use cash to purchase tickets that cost as much as \$2100. Moreover, even if respondent's cash purchase did not suggest that he was in possession of narcotics when he left Honolulu, it supported the conclusion that he possessed narcotics when he returned to Honolulu from Miami. Respondent's cash purchase therefore was an important ingredient in establishing reasonable suspicion.

2. Respondent was traveling under the name "Andrew Kray"; the telephone number that he gave to the airline ticket agent was listed under the name "Karl Herman"; respondent's voice was on the answering machine that responded at the number; and the officers could not verify that an "Andrew Kray" lived in Hawaii

An alias helps to avoid detection, and narcotics couriers, like other criminals, frequently use an alias or give the airlines a false callback telephone number for that purpose.¹² The evidence in this case sup-

¹² See, e.g., *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); *United States v. Espinosa-Guerra*, 805 F.2d at 1508; *United States v. Hanson*, 801 F.2d at 763; *United States v. Palen*, 793 F.2d 853, 857 (7th Cir. 1986); *United States v. Sadosky*, 732 F.2d 1388, 1393 (8th Cir.), cert. denied, 469 U.S. 884 (1984); *United States v. Puglisi*, 723 F.2d 779, 789 (11th Cir. 1984); *United States v. Ehlebracht*, 693 F.2d 333, 336 (5th Cir. 1982); *United States v. Jodoin*, 672 F.2d at 233; *United States v. Berd*, 634 F.2d 979, 986 (5th Cir. 1981) (traveling under an alias is "a practice

plied a basis for inferring that respondent was traveling under an alias and therefore increased the agents' suspicion that he was involved in narcotics trafficking. The court of appeals disagreed, but its reasoning is wholly unconvincing. The court stated that "it is not unusual for persons with different last names to share a common residence and telephone" and for a person "to dictate prerecorded messages on the answering machine even though his or her name is not listed with the phone company as the subscriber." Pet. App. 18a. While persons with different names may occasionally share the same telephone, the agents knew more than that respondent had given the airline a number listed in a different name. They knew that upon dialing the number, they heard a recording in respondent's voice on the telephone answering machine, and they could not find a telephone listing in Honolulu for "Andrew Kray." Because respondent had prepared the message on the telephone answering machine, it was reasonable for the agents to assume that he was the principal user of the telephone.

As it turned out, the agents were correct that respondent was traveling under an alias. But even if the agents had been wrong, the evidence regarding the telephone was certainly sufficient to generate suspicion that respondent was not using his real name, particularly since he had paid cash for his ticket and had thereby avoided having to present

common to drug couriers"; the use of a false telephone number is "a practice commonly used by narcotics couriers to prevent later detection"; *United States v. Lewis*, 556 F.2d 385, 389 (6th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (use of an alias when purchasing an airline ticket "indicated the likelihood of an illicit purpose in the trip").

identification to the ticketing agent. The agents' commonsense judgment that respondent was using an alias is precisely the type of rational inference that law enforcement officers are entitled to draw in deciding whether to conduct a brief investigative stop. *Terry* requires no more.

3. Respondent's destination was Miami

The identity of respondent's destination was also an important factor in establishing reasonable suspicion. As Agent Kempshall testified (J.A. 60), and as this Court, the lower federal courts, and the whole nation know, "Miami is the granddaddy source city of them all" for narcotics, particularly cocaine.¹³

4. Respondent stayed in Miami for only 48 hours, even though the round-trip flight between Honolulu and Miami takes 20 hours

Just as respondent's cash purchase of airline tickets made it unlikely that he went to Miami on business, the brevity of respondent's stay in Miami made it unlikely that he went there for a vacation. Few people spend the equivalent of a full day and

¹³ *E.g.*, *Illinois v. Gates*, 462 U.S. 213, 243 (1983) ("In addition to being a popular vacation site, Florida is well known as a source of narcotics and other illegal drugs."); *United States v. Pantazis*, 816 F.2d 361, 363 (8th Cir. 1987) (Miami is "a source city for narcotics"); *United States v. Hays*, 825 F.2d 32, 34 (4th Cir. 1987) (Miami is a "known source[] of drug supplies"); *United States v. Espinosa-Guerra*, 805 F.2d at 1508; *United States v. Berd*, 634 F.2d at 985 (Miami is "a known distribution center for cocaine"); H.R. Rep. 98-444, 98th Cong., 1st Sess. 2 (1983) ("Geography and tradition have made Florida the preferred destination of drug smugglers from South America and the Caribbean").

night on an airplane, traveling 12,000 miles, for a two-day vacation. By contrast, a quick trip to a city (like Miami) that is a major source of narcotics is consistent with narcotics trafficking.¹⁴

5. *Respondent was nervous when purchasing his tickets, and he appeared nervous and watchful while he was awaiting his connecting flight in the Los Angeles airport*

Innocent travelers often exhibit nervousness in an airport because of their anxiety about flying. But nervousness in an airport is also consistent with narcotics trafficking, and it is an important fact in an agent's assessment whether a person is transporting drugs. Common sense teaches as much. Carrying narcotics is apt to provoke anxiety, which may manifest itself in subtle, but discernible, ways. That is particularly true if the person involved is aware of the airport drug detection program undertaken by federal, state, and local law enforcement agencies. Nervousness, accordingly, is a natural reaction of someone who is in possession of narcotics (or a large sum of cash to purchase drugs) and who may be

¹⁴ See, e.g., *United States v. Whitehead*, slip op. 20 ("after allegedly vacationing in Miami for only two days, Whitehead elected to take a twenty-six hour train trip home, at a cost substantially higher than the price of an airline ticket"); *United States v. Pantazis*, 816 F.2d at 362-363 (round trip between Minneapolis and Miami; suspect stayed in Miami only 15 hours); *United States v. Palen*, 793 F.2d at 857 (five-day stay in Florida is "a relatively short period of time * * * for a tourist from Alaska"); *United States v. Ehlebracht*, 693 F.2d at 336; *United States v. Berd*, 634 F.2d at 985 ("a quick turnaround trip" is "a practice frequently employed by [drug] couriers"); *United States v. Lewis*, 556 F.2d at 389.

scanning an airport for narcotics agents conducting surveillance.¹⁵

The court of appeals altogether discounted respondent's nervousness on the ground that he could have been worried about a "mid-air collision" or "delays." Pet. App. 20a. That reasoning fails to consider respondent's nervousness in the context in which it appeared in this case. First, the agents who observed respondent in Los Angeles did not simply report that respondent appeared nervous; they reported that he was nervous and looking around the waiting area—conduct far more consistent with nervousness about apprehension than nervousness about flight risks and delays. Second, if respondent was nervous about flying, it is hardly likely that he would have chosen to take an indirect route back to Hawaii involving two stopovers. Finally, nervousness about flight risks and delays would not explain other suspicious facts in this case. For example, nervousness about mid-air collisions is not likely to lead a person to travel under an alias. By contrast, nervousness about possible apprehension for drug smuggling is entirely consistent with the use of an alias. Thus, the agents properly considered respondent's nervousness as further support for their belief that he was involved in wrongdoing.

¹⁵ Numerous courts have treated a suspect's nervousness while traveling as an important factor in determining the existence of reasonable suspicion. See, e.g., *United States v. Mendenhall*, 446 U.S. at 564 (opinion of Powell, J.); *United States v. Gonzales*, 842 F.2d 748, 753 (5th Cir. 1988); *United States v. Williams*, 754 F.2d 672, 674 (6th Cir. 1985); *United States v. Sadosky*, 732 F.2d at 1393; *United States v. Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982), cert. denied, 464 U.S. 933 (1983); *United States v. Ramirez-Cifuentes*, 682 F.2d 337, 342 (2d Cir. 1982).

6. Respondent purchased the tickets shortly before the flight; he and his companion checked none of their four bags on either leg of their journey; they returned to Honolulu by a route that involved different flights and included two stopovers; and respondent was young and casually attired

The above facts are consistent with the modus operandi of a narcotics courier.¹⁶ Purchasing tickets shortly before the flight reduces the time available to narcotics agents to conduct surveillance at the point of departure, or to arrange for followup surveillance at the point of arrival. Using carry-on luggage allows a narcotics courier to leave the airport terminal quickly, and it helps to avoid the risk that his luggage will be misrouted to the wrong destination, accidentally opened by airline employees, or damaged in a manner that reveals its illicit contents. Changing flights is also a means of disrupting surveillance.

Youth and casual attire are not in themselves suspicious, but in conjunction with other factors they are entitled to some weight. Drug smuggling, like most other criminal conduct, is known to be more frequent among the youthful than among the middle-

¹⁶ See, e.g., *Florida v. Royer*, 460 U.S. at 502 (plurality opinion) (suspect was young and casually dressed); *United States v. Mendenhall*, 446 U.S. at 564-565 (opinion of Powell, J.) (changing flights); *United States v. Gonzales*, 842 F.2d at 753 (suspect "was dressed loudly, was of a young age," and "carried only a gym bag for a lengthy trip"); *United States v. Espinosa-Guerra*, 805 F.2d at 1508 (use of carry-on luggage); *United States v. Borys*, 766 F.2d 304, 311 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986) (suspect casually dressed and used carry-on bags); *United States v. Berd*, 634 F.2d at 985 (same). Cf. *United States v. Brignoni-Ponce*, 422 U.S. at 885 (mode of dress and haircut are relevant factors in determining reasonable suspicion of illegal entry).

aged. In addition, a person carrying a large amount of cash who does not appear to be dressed for a business trip, but who is traveling a long distance for only a short stay at his destination, does not fit easily into one of the usual categories of legitimate air travelers.

A narcotics agent could reasonably draw the following inferences from all of the facts known to the agents in this case. First, respondent did not go to Miami on business. Business travelers ordinarily use travel agencies or credit cards to purchase their tickets. Second, respondent did not travel to Miami for a vacation. Few people who live in Honolulu would take a summer vacation in Miami, a similar tropical locale, but fewer still would spend at least 20 hours traveling in order to spend only two days on vacation. Third, respondent did not go to Miami for another innocent personal reason, such as a wedding or a funeral. A person is not likely to use an alias when traveling to a wedding or a funeral, and petitioner was hardly dressed for such an occasion. Nor was it likely that he was carrying more formal dress, since his carry-on bags were not designed to accommodate a suit.¹⁷ Accordingly, an experienced narcotics agent could quite reasonably believe, based on all the facts, that respondent was involved in narcotics activity.

But even if that conclusion were wrong, a narcotics officer need not conclusively establish that a person is guilty, or even that the odds are 50-50, before he may make a *Terry* stop. This Court's pre-

¹⁷ Respondent's luggage is described in the search warrants issued by the magistrate in this case. See J.A. 13; *United States v. Three Pieces of Matching Louis Vuitton Soft Luggage*, No. 84-0245MT (D. Haw. July 26, 1984), slip op. 1; E.R. 56.

cedents require only a rational, objectively based inference that criminal activity "may be afoot." The agents' belief here easily meets that standard.

In fact, the evidence known to the agents was stronger than the evidence in *Florida v. Royer*, 460 U.S. 491 (1983), in which eight Members of this Court agreed that the evidence was sufficient to establish reasonable suspicion. *Id.* at 502 (plurality opinion); *id.* at 515-516 (Blackmun, J., dissenting); *id.* at 523-524 (Rehnquist, J., dissenting).¹⁸ In that case, the officers knew that Royer was traveling under an alias, that he had paid cash for his ticket, that he had put only a name and not an address on his checked luggage, that he was young and casually dressed, and that he seemed nervous while walking through the Miami airport. In this case, as in *Royer*, the officers had a strong indication that respondent was traveling under an alias, and they knew that respondent had made a huge cash payment for his tickets, that he was traveling to Miami, that he was young and casually dressed, and that he displayed nervousness in both the Honolulu and Los Angeles airports. But in this case there were even more suspicious factors than in *Royer*: Respondent did not check any bags at all for either trip; his itinerary was bizarre; and his pattern of travel suggested

¹⁸ The evidence in this case was also stronger than the evidence in *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (suspects at Miami airport spotted plainclothes officers and spoke furtively to one another; one suspect urged the others to "get out of here"; another made strange movements as if to escape; the suspects made contradictory statements regarding their names), and *United States v. Mendenhall*, 446 U.S. at 564-565 (opinion of Powell, J.) (the suspect arrived from a drug source city, deplaned last, scanned the gate area, claimed no baggage, and acted as if changing flights).

neither a business trip nor a vacation. What it did suggest, and what in fact turned out to be the case, was that respondent was bringing narcotics back from Miami to Honolulu.

B. The Two-Part Reasonable Suspicion Standard Adopted By The Court Of Appeals Is Inconsistent With Settled Fourth Amendment Law

In its first opinion, the court examined each factor separately and concluded that no individual factor established reasonable grounds to suspect that respondent was engaged in illegal activity when he was stopped. The court did not consider whether the totality of circumstances supplied reasonable suspicion, as this Court has required. *United States v. Cortez*, 449 U.S. at 417. In its second opinion, the court took a different tack. In that opinion, the court acknowledged that all of the factors known to the narcotics officers must be considered, but the court then adopted a two-part test under which the court found the information available to the agents to be insufficient. The court created two categories of evidence: one indicative of ongoing criminal conduct (such as the use of an alias), and the other indicative of conduct that criminals often engage in (such as the cash purchase of airline tickets). The court then held that factors from the second category cannot supply reasonable suspicion absent some factor from the first one. Moreover, the court held that before relying on factors from the second category, the government must establish through empirical or statistical proof that those factors identify someone who is presently engaged in criminal activity, rather than someone who is merely a criminal or who is innocent of any crime.

The court of appeals' two-part test is based on a misreading of this Court's decision in *Reid v. Georgia*, 448 U.S. 438 (1980). In *Reid*, the Court held that the narcotics officers who stopped the defendant did not have a sufficient basis for an investigative detention. When the officers in *Reid* stopped the defendant, they knew only that (1) he and a companion had arrived in Atlanta from Fort Lauderdale, a source city for cocaine; (2) they had arrived early in the morning, when law enforcement activity is light; (3) both persons carried only shoulder bags; and (4) the defendant and his companion appeared to be attempting to conceal the fact that they were traveling together. The Court ruled that the first three facts were insufficient to constitute reasonable suspicion, because they "describe a very large category of presumably innocent travelers." 448 U.S. at 441. The Court also found that the last fact was insufficient under the circumstances of that case to supply reasonable suspicion. *Ibid.*

The court of appeals erroneously believed that *Reid* adopted a new standard for determining reasonable suspicion, a standard under which facts that "describe a very large category of presumably innocent travelers" must be discounted from the reasonable suspicion determination. But this Court adopted no such test in *Reid*, nor did the Court hold that facts describing innocent travelers are never relevant to the reasonable suspicion inquiry. On the contrary, this Court expressly recognized that "there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot." *Reid v. Georgia*, 448 U.S. at 441. The Court simply found that "this is not such a case." *Ibid.* *Reid* therefore did not purport to

adopt a new reasonable suspicion standard under which lawful conduct is "irrelevant" (Pet. App. 19a) to the reasonable suspicion determination, as the court of appeals concluded, unless that conduct is consistent only with criminal activity.

This Court's other decisions also demonstrate that it would be incorrect to disregard evidence that is equally consistent with innocence and guilt when determining if reasonable suspicion exists. For example, *Terry v. Ohio* recognized that a series of acts may be entirely innocent when each one is viewed by itself, but may be suspicious when they are examined in their totality. 392 U.S. at 22. See also *United States v. Cortez*, 449 U.S. at 417-419. In *Illinois v. Gates*, 462 U.S. 213, 243-244 n.13 (1983), the Court noted that "innocent behavior frequently will provide the basis for a showing of probable cause," and that "[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." That principle is equally applicable to the reasonable suspicion determination. Indeed, *Gates* expressly held that the probable cause standard for an arrest does not require that it be more likely than not that the suspect has committed a crime; only a "fair probability" is necessary. *Id.* at 235, 238, 243-244 n.13.¹⁹ Because the quantum of suspicion necessary for a *Terry* stop is less than probable cause, it follows that the evidence supporting reasonable sus-

¹⁹ In fact, even the reasonable doubt standard applicable at trial does not require a court to find that the proof is inconsistent with some conceivable hypothesis of innocence. *Jackson v. Virginia*, 443 U.S. 307, 317 n.9, 326 (1979); *Holland v. United States*, 348 U.S. 121, 139-140 (1954).

picion need not establish the commission of a crime even half the time.

Reid therefore does not support the court of appeals' conclusion that, before a police officer may make a *Terry* stop, he must prove that the facts known to him do not also fit the description of an innocent traveler. The courts of appeals have made this point expressly. As the Second Circuit once put it in an oft-quoted passage, "[i]t must be rare indeed that an officer observes behavior consistent *only* with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (1979) (emphasis in original).

That principle is eminently sensible. Any number of factors standing alone may describe large numbers of innocent travelers as well as a large percentage of drug couriers. For example, wearing casual dress, being young, and not checking baggage certainly describes many travelers. For that reason, one or all of those factors would not be enough, standing alone, to justify an investigative detention. But those factors, in a particular context and in conjunction with other evidence, can properly lead trained officers observing a suspect to conclude that there is enough evidence to distinguish him from the ordinary traveling public to justify a brief detention and inquiry.

The court of appeals' two-part test is also unsound because it treats the factors bearing on reasonable suspicion precisely the way *Terry* said they should not be treated. It creates a false dichotomy between direct evidence—which is roughly equivalent to the court of appeals' category of evidence indicative of criminal activity—and circumstantial evidence—which is roughly equivalent to the court of appeals'

category of evidence indicative of criminal character. But the factors that indicate that a person is a drug smuggler do so precisely because they tend to be associated with the act of drug smuggling. The factors bearing on the issue of reasonable suspicion therefore cannot be neatly lumped into one of two categories, as the court of appeals did in this case.

The fact that the evidence on which the officers relied was circumstantial does not lessen its probative value. See *Holland v. United States*, 348 U.S. 121, 139-140 (1954); 1A J. Wigmore, *Evidence* § 26, at 961 (Tillers rev. ed. 1983). "Wigmore's view that circumstantial evidence may be as persuasive and as compelling as testimonial evidence, and sometimes more so, is now generally accepted. There are innumerable decisions that support the thesis that circumstantial evidence can provide a compelling demonstration of the existence or nonexistence of a fact in issue." 1A J. Wigmore, *supra*, § 26, at 961.

This Court has repeatedly held that circumstantial evidence may be considered in determining whether there are reasonable grounds to link a person with criminal activity. *Adams v. Williams*, 407 U.S. 143, 147 (1972), rejected the notion that reasonable suspicion can be based only on a police officer's personal observations of a potential crime. In *United States v. Cortez*, which involved illegal entry into this country, the Court pointed out that "all of the circumstances," including "consideration of the modes or patterns of operation of certain kinds of lawbreakers," must be considered in any reasonable suspicion analysis. 449 U.S. at 418. In fact, *Cortez* found it "[o]f critical importance" that "the officers knew that the area [they were investigating] was a crossing point for illegal aliens" (*id.* at 419), and agreed that this "pattern of operations" provided relevant

background information against which the other evidence could be assessed. *Ibid.* Similarly, in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975), which also involved illegal entry into the United States, the Court found that a variety of circumstantial evidence is relevant to the reasonable suspicion determination, such as the characteristics of the area in which a person is observed, its proximity to the border, recent border crossings, unusual traffic patterns, and the type of vehicle stopped. See also *United States v. Mendenhall*, 446 U.S. 544, 563 (1980) (opinion of Powell, J.) ("Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices.").

To divide the facts typically relied on by narcotics agents into the two categories invented by the court of appeals also improperly denigrates certain highly significant factors. For instance, the large cash purchase of airline tickets is not simply a characteristic typical of many innocent travelers, or even many criminals, as the court of appeals believed. It has a logical bearing on the likelihood that a person is engaged in criminal conduct at that time, because it enables him to use an alias and avoid leaving a paper trail that can tie him to a particular trip.²⁰ Not

²⁰ In this respect, the contrast between the court of appeals' first opinion and its second is striking. In its first opinion, the court regarded the cash purchase of tickets standing alone as being "close" to reasonable suspicion. Pet. App. 42a. In the court of appeals' second opinion, however, the cash purchase of tickets had tumbled into the second category of factors and was not considered relevant at all.

checking luggage is also a technique used by drug couriers. It minimizes the risk of apprehension, by enabling a person to leave an airport terminal quickly, and it lessens the risk that his cargo will be lost or accidentally revealed. Finally, a brief trip to and from a city like Miami is not "evasive" conduct (Pet. App. 11a) and thus would not fit into the court of appeals' first category. Nonetheless, that fact is surely relevant to the question whether a suspect is presently engaged in drug trafficking. Yet the court of appeals' analysis does not take that fact into consideration at all.

The court of appeals' test also assigns too little weight to a suspect's nervousness, which the court placed in the second category—describing criminal character—rather than the first category—describing ongoing criminal activity. Nervousness is especially relevant in the investigation of drug couriers because of their obviously heightened concern about arrest while passing through airports.²¹ In relegating nervousness to the second category, the court also failed to realize that an experienced narcotics agent can often distinguish persons who fear flying from in-

²¹ In its first opinion—before it had focused on the fact that there was evidence of nervousness in this case—the court of appeals placed the nervousness factor in the first category, not the second. See Pet. App. 43a (emphasis in original) ("[respondent's] payment in cash is quite unlike a suspect's looking around to see if he was being watched, appearing nervous, taking evasive action, or using an alias while traveling, all of which at least tend to raise a suspicion that criminal activity is going on at that time"). By contrast, in its second opinion—in which the court of appeals accepted the district court's factual finding that respondent was nervously scanning the Los Angeles airport waiting area (*id.* at 6a-7a n.5)—the court discounted respondent's nervousness entirely.

dividuals who fear arrest. Accordingly, it is both unrealistic and unresponsive to subtle differences in human behavior simply to lump nervousness as a whole into the category of conduct that does not suggest ongoing criminal conduct.

Another flaw in the court of appeals' two-part test is that it disregards the principle that a reviewing court must examine the facts known to the officer in light of the reasonable inferences that a trained, experienced law enforcement officer will draw. In *United States v. Cortez*, 449 U.S. at 418, the Court stated that whether the evidence known by an officer amounts to reasonable suspicion must be determined by the officer's "common-sense conclusions about human behavior," and that the facts "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." See also *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985); *United States v. Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *United States v. Brignoni-Ponce*, 422 U.S. at 885; *Terry v. Ohio*, 392 U.S. at 27. An experienced narcotics agent is a professional observer of criminal activity and can see meaning in conduct that might appear innocent to the untrained eye. *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979).²² It should be

²² The narcotics agents involved in this case had extensive experience in apprehending drug couriers. Officer McCarthy had worked with the Drug Enforcement Administration at the Honolulu airport for two years and had participated in 300 narcotics investigations, two-thirds of which involved cocaine and most of which occurred at the airport. DEA Agent Kempshall had 15 years' experience and had participated in approximately 1000 narcotics investigations, half of which involved cocaine. He had been patrolling the Hono-

expected that experienced law enforcement officers will be able to discern criminal conduct that they have been trained or have learned from experience to recognize.

The judgment of experience is particularly important in the case of offenses such as the transportation of narcotics. Smuggling is a crime of stealth, requiring only concealment and escape for its completion. A smuggler's goal is to do as little as possible to provoke suspicion. For that reason, it is not surprising that a person transporting drugs would act in a manner that would not appear highly suspicious to a lay observer. Only by noticing and piecing together subtle clues can a narcotics agent discern whether a particular individual is likely to be carrying contraband.

Contrary to the court of appeals' assumption, the kinds of factors that are important to experienced agents in deciding whether to stop a person traveling through an airport are not readily susceptible to empirical or statistical proof. It is difficult to assign a numerical value to nervousness for statistical purposes. The significance of other incongruities in demeanor, behavior, or dress are equally difficult to quantify. In a case such as this one, how could the government be expected to present statistical evidence regarding the likelihood that a person taking a four-day trip from Honolulu to Miami and back (via an indirect route) would be returning with narcotics? How much empirical evidence is apt to be available regarding the frequency with which persons who pay \$2100 in cash for airline tickets are engaged

lulu airport for narcotics traffickers since 1979, and he had discussed the manner in which cocaine is transported with fellow agents and with drug couriers. J.A. 36-39, 48-50.

in illegal activities? By ordering experienced narcotics agents to justify their investigative decisions with statistical proof, the court of appeals has essentially rejected the use of inferences based on common sense and the shared experience of agents in the field. That approach is flatly inconsistent with this Court's decisions.

In requiring empirical proof of the reliability of the factors on which narcotics agents rely in making investigative stops, the court of appeals appeared to be reacting against what it perceived as the improper reliance by the agents on a "drug courier profile" as a device to justify stopping travelers in airports. The agents, however, did not rely on any such "profile" in this case. They relied, instead, on "[t]he totality of the information" about respondent and reasonable inferences that could be drawn from that information based on their experience and common sense. J.A. 59. Respondent was not stopped because he fit some abstract "profile," but because his conduct was unusual in several respects that indicated he might be smuggling drugs.

Moreover, contrary to the court of appeals' assumption, there is no national "drug courier profile" that DEA agents invoke in deciding whether to stop particular individuals as they pass through airports. Over time, of course, agents learn to recognize certain features commonly exhibited by drug couriers. They rely on that experience in making stops, and they share their experience with other agents. But that is no different from the way police officers function in any other investigative context. It is the essence of good police work for agents to enhance their ability to spot criminals by pooling their knowledge and experience with the knowledge and experience

gained by other agents doing similar work. But pooling collective experience is not the same as relying on a mechanical "profile" as a substitute for judgment. Because there was no such reliance in this case—and because the DEA does not purport to have a "profile" that serves as a divining rod to detect narcotics smugglers in every case—there was no need for the court of appeals to invent a new test for assessing reasonable suspicion in the airport context. The traditional test set forth in *Terry* and employed regularly since that time is perfectly adequate to the task.

Besides adding unnecessary complexity to the reasonable suspicion inquiry, the court of appeals' test would also have two grave practical consequences. First, it would prove unworkable in the field, where officers must act without the guidance of a lawyer or a statistician and must rely on their training, experience, and common sense. Second, it would prevent agents from briefly detaining a suspected narcotics smuggler absent a high degree of suspicion based on the direct observation of criminal conduct. Those consequences would have a disabling effect on airport narcotics surveillance, which has proved to be a highly successful means of interdicting drug smugglers.

Since 1974, the Drug Enforcement Administration, in conjunction with state and local law enforcement agencies, has operated a drug courier surveillance program at numerous airports throughout the nation in order to stem the flow of narcotics from abroad and between the states.²³ The DEA's airport nar-

²³ The program is operated by the DEA at approximately 30 airports across the nation, and state and local law enforcement agencies operate an equal number of similar programs on their own.

cotics detection program plays an important role in the agency's overall drug enforcement efforts, because it provides the DEA with the opportunity to intercept narcotics at a point in the distribution chain above the level that can be reached by more traditional undercover operations. Agents participating in the DEA's programs are trained to distinguish narcotics couriers, or "mules," from legitimate travelers by relying on the type of circumstantial evidence that was present in this case and that has been deemed indicative of narcotics trafficking by this Court and the courts of appeals. If the court of appeals' two-part reasonable suspicion test were endorsed by this Court, that test would outlaw a large percentage of the stops of suspected narcotics traffickers who pass through the nation's airports. That consequence would seriously damage the powerful national interest in bringing narcotics trafficking to a halt.²⁴

In the final analysis, the two-part test devised by the Ninth Circuit is reminiscent of the multi-part *Aguilar-Spinelli* test that the Court once applied in making probable cause determinations. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). In *Illinois v. Gates*, *supra*, the Court rejected that test in favor of a "totality-of-the-circumstances" approach to probable

²⁴ See *United States v. Montoya de Hernandez*, 473 U.S. at 538; *Florida v. Royer*, 460 U.S. at 508 (Powell, J., concurring); *id.* at 513 (Blackmun, J., dissenting); *United States v. Mendenhall*, 446 U.S. at 561-562 (opinion of Powell, J.); *United States v. Berry*, 670 F.2d 583, 602 (5th Cir. 1982) (en banc) (noting "the exceedingly strong government interest in ending trafficking in drugs"); S. Rep. 98-225, 98th Cong., 1st Sess. 255 (1983) ("[i]llicit trafficking in drugs is one of the most serious crime problems facing the country").

cause. The Court did so because the *Aguilar-Spinelli* test did not permit "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability)" and "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that simply cannot sensibly be divorced from the other facts presented to the magistrate." *Illinois v. Gates*, 462 U.S. at 234-235 (footnote omitted).²⁵ The two-part reasonable suspicion test adopted by the court below is subject to precisely the same criticism: Its overly mechanical formulation and application will impede, rather than assist, clarity of analysis of the strength of the evidence supporting a narcotics officer's judgment. As this case shows, the court of appeals' test obscures the probative force of evidence that, when viewed as a whole and in a commonsense fashion, amply justified the agents' suspicions that respondent's curious four-day journey between Honolulu and Miami had a criminal purpose.

²⁵ Significantly, in adopting a totality-of-the-circumstances approach for probable cause, *Gates* relied on *Cortez*, which had endorsed that approach for reasonable suspicion. *Illinois v. Gates*, 462 U.S. at 231-232 (quoting *United States v. Cortez*, 449 U.S. at 418).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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